giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial."

In the case of the present appeal, the conviction in the criminal proceedings is no evidence in civil proceedings but the plea of guilty to the charge, being an admission which may support the plaintiff's case, is admissible. Now, it is important to consider the charge to which the defendant pleaded guilty both for the purposes of considering how far that admission helps the plaintiff's case and for the purposes of the second ground of appeal. The charge was that the defendant had failed to comply with an order given by the President of the Municipal Council requiring him to demolish the partitions at premises No. 25 Chow Kit Road, Kuala Lumpur, on or before the 24th November, 1954. Now, in the statement of claim the breach of the provisions of the Municipal Ordinance committed by the defendant on which the plaintiff relied was that the defendant had made unauthorized major alterations and additional construction in the premises in question without the knowledge and consent of the plaintiff. It may be that the defendant had committed such breach and that the order issued to him by the President of the Municipal Council was in respect of such breach but in the criminal proceedings in which the defendant pleaded guilty on the charge referred to above there was no admission of such breach; the only admission was that the defendant had failed to comply with the order of the President of the Municipal Council. The burden of proving the breach on which the plaintiff relied was upon the plaintiff, and the admission made by the defendant in the criminal proceedings does not help his case.

With regard to the second ground of appeal: In coming to his decision on facts the learned President did not rely exclusively on the conviction; he said: "I think that the conviction itself is sufficient evidence but I find as a fact that he did commit such breach." For the reasons set out above, the evidence of the conviction is to be excluded and it is therefore necessary to consider the effect of the second part of the learned President's statement, that is, "I find as a fact that he did commit such breach." It seems clear to me that what the learned President had in mind when he referred to "such breach" was the breach in respect of which the conviction was obtained and that breach was not, as I pointed out earlier the breach of the Municipal laws on which the plaintiff was relying. It is, therefore, necessary to look into the evidence which was before the learned President to find out that the breach relied on was or was not committed. There is nothing in the grounds of judgment of the learned President to indicate that he felt that the witnesses for the defence were not reliable and in default of such expression of opinion and in default of anything arising from the written depositions of the witnesses for the defence to show that such witnesses are not reliable, their evidence cannot be disregarded. Having considered the evidence I have come to the conclusion that the finding of fact of the learned President that the defendant had committed the breach of law relied on by the plaintiff was not supported by the evidence. The plaintiff bought the premises in question when it was already occupied by the defendant as tenant and there is ample evidence to show that when he bought these premises and when the defendant moved in, such premises were divided into seven rooms; no alterations, apart from repairs, were made by the defendant.

For these reasons, the suit should have been dismissed and the appeal is allowed with costs here and below.

Appal allowed.

Solicitors: *R. R. Chelliah; Bannon & Bailey.*

W. G. BUTTERY v. JAMES WARREN & CO. LTD.

[O. C. J. (Pretheroe J.) January 12, 1956]

[Ipoh — Civil Suit No. 36 of 1955]

Contract of employment — Conflict between provisions in clauses therein — Construction.

The issues in this case concerned the correct construction of clauses in a contract of employment made between the plaintiff and the defendants. By clause 9 of the contract either party thereto had rights to determine the contract by giving the other party three months' notice in writing of such intention. Pursuant to this the defendants gave the required notice to the plaintiff determining his service with them with effect from November 30, 1954 and were willing to fulfil their obligation to provide plaintiff with passage to the United Kingdom. For personal reasons plaintiff preferred to remain in Malaya and requested the defendants to pay him his leave salary in Malaya in the form of a lump sum payment. The defendants agreed to this proposal and this raised the first issue viz. to what "salary" was plaintiff entitled when absent from Malaya after the prescribed period of notice to terminate his contract had expired?

By clause 9(1) of the contract, in the event of the Company terminating the employee's service he was entitled to: (a) salary up to date upon which the notice expired; (b) "dearness allowance" up to the date upon which the notice expired; and (c) furlough salary as provided in clause 13 thereof. Clause 13 provided, *inter alia*, in respect of the above said furlough the employee should be entitled to: (a) salary in terms of clause 8(1) of the said contract to which the employee would have been entitled had he been continuing his duties in Malaya; and (b) "dearness allowance" during the above said period of furlough. Clause 14, however, provided *inter*

alia: "In this Agreement . . . 'salary' and 'furlough salary' mean monthly pay provided for in clause 8(1) hereof and do not include any commission or allowances . . ."

Counsel for the plaintiff submitted that the joint effect of the provisions contained in clauses 9(1)(c) and 13(b) the plaintiff was entitled to "dearness allowance" in respect of his period of leave and this right was not in any way affected. He admitted that that interpretation caused a conflict with the provisions of clause 14.

Held: (1) in this case the earlier clauses must prevail over the later one;

(2) the plaintiff was therefore entitled to the allowances claimed.

The second issue concerned commission. On this issue the learned Judge also found in favour of the plaintiff.

Case referred to:—

(1) *Forbes v. Git & Ors.* (1922) 1 A.C. 256, 259.

CIVIL SUIT.

S. K. Das for the plaintiff.

D. G. Rawson for the defendants.

Pretheroe J. : —When the plaint in this suit was filed it contained numerous claims against the defendant company. Before it came up for hearing, however, all except two issues had been amicably settled. Both issues concerned the correct construction of clauses in a contract made between the parties and no evidence was led by either side.

Plaintiff was the manager of the defendants' branch at Ipoh. Originally his terms of service were contained in an exchange of correspondence but later a formal contract was substituted for the correspondence. It is common ground between the parties that, in respect of the two issues with which I am concerned, the legal effect of the two contracts was identical. Thus I need only consider the provisions of the formal contract.

Clause 9 of the contract provided that either party thereto had the right to determine the contract by giving the other party three months' notice in writing of such intention. By a letter dated the 28th August, 1954, the defendants gave the plaintiff notice that his service would determine with effect from the 30th November, 1954. Defendants were under an obligation, which they were willing to fulfil, to provide plaintiff with a first class sea passage to the United Kingdom. For personal reasons, however, plaintiff preferred to remain in Malaya and, in those circumstances, the plaintiff requested the defendants to pay him his leave salary in Malaya in the form of a lump sum payment. The defendants agreed to this proposal and this raised the first issue viz. to what "salary" was plaintiff entitled when absent from Malaya after the prescribed period of notice to terminate his contract had expired? I should interpolate at this point that it is not disputed that, when serving the defendant company in Malaya, plaintiff was entitled to a salary with annual increments and also to, what was termed, a "Dearness Allowance" which, at the material time, was computed at the rate of 50% of his current salary.

Clause 9(1) of the contract provided, *inter alia,* as follows :—

"(1) In the event of the Company terminating the Agreement under this Clause the Employee shall be entitled to:—

(a) Salary up to the date upon which the said notice expires.

(b) Dearness Allowance (if any) up to the date upon which the said notice expires.

(c) Furlough salary as provided in Clause 13 hereof."

Clause 13 provided, *inter alia,* as follows :—

"In respect of the aforesaid furlough the Employee shall be entitled to:—

(a) Salary in terms of Clause 8(1) hereof to which the Employee would have been entitled had he been continuing his duties in Malaya.

(b) Dearness Allowance (if any) during the aforesaid period of furlough."

There was a proviso to this clause but, in the conditions which have arisen, the provisions of that proviso did not become operative. For the plaintiff, therefore, Mr. Das submitted that by the joint effect of the provisions contained in Clause 9(1)(c) and 13(b) plaintiff is entitled to "dearness allowance" in respect of his period of leave and this right is not in any way affected by the proviso to Clause 13 which is inapplicable to existing circumstances. Mr. Das admitted that this interpretation causes a conflict with Clause 14 which provides, *inter alia* :—

"In this Agreement . . . . 'salary' and 'furlough salary' mean monthly pay provided for in Clause 8(1) hereof and do not include any commission or allowances . . . ."

On behalf of the defendants Mr. Rawson contended that the second part of Clause 13 deals with "furlough" only and not "furlough salary" which are two distinct things. This is correct in the sense that the words "furlough salary" do not appear in the relevant part of the clause but nevertheless that part certainly deals with the "salary" to which the plaintiff was entitled "in respect of the aforesaid furlough." Mr. Rawson further submitted that the construction favoured by Mr. Das caused a conflict with Clause 14 and such conflict should be avoided if any other construction was

reasonably possible which avoided such conflict. I do not disagree with this but I cannot see how the conflict is to be avoided in view of the precise and explicit provisions of Clause 9(1) (c) read in conjunction with Clause 13(b). Having thus decided that there is a conflict between the two clauses to which I have just referred and Clause 14 I have next to decide which is to prevail. This matter was considered in *Forbes v. Git & Ors.*[1] though it was ultimately held on appeal to the Privy Council that there was in fact no repugnancy or conflict between two clauses of the contract in that case. In his judgment Lord Wrenbury considered the matter of repugnancy and stated as follows :—

> "The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay £100 and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant."

Other authorities for this "principle of law" are to be found in a footnote at page 160 of *Chitty* on Contracts (20th Edition). The learned authors of that text-book consider this rule "to be a mere rule of thumb" and "totally unscientific" but they agree that it must be resorted to "when all else fails." As far as I am concerned, "all else has failed" in this case and consequently I apply the rule and find in favour of the plaintiff on this issue on the ground that the earlier clauses must prevail over the later one. It was not disputed that, if plaintiff was successful on this issue, he was entitled to eight months' allowance at the rate of $325 *per mensem* and consequently I award him $2,600 on this issue.

The second issue concerns commission. By virtue of Clause 8(3) of the contract plaintiff was entitled to be paid 2½% of the net profits earned by the Ipoh Branch of the defendant company in any one year and Clause 13(c) provided that plaintiff's commission while on leave should be one half of that "to which he would have been entitled had he continued his duties in Malaya." In the plaint plaintiff claimed that he was entitled to be paid commission at the rate of 1¼% of the net profits of the Ipoh Branch during the eight months of his leave. He relied on Clauses 9(1) (d), 13(c) and 8(3). It will be observed that two of these clauses are the same as those relied upon by the plaintiff in his claim for "dearness allowance." The additional sub-clause (8(3)) merely provided for the method of calculating the amount of the annual net profit of the Branch and fixed the rate of commission at 2½% of such net profit. The arguments of both counsel on this issue were the same as those advanced by them on the "dearness allowance" issue and it was agreed that the decisions on the two issues must be in favour of the same party.

For the reasons I have already stated regarding the previous issue I also find in favour of the plaintiff on this issue. I find that plaintiff is entitled to be paid 8/12ths of the sum obtained by computing 1¼% of the net profits of the Ipoh Branch of the defendants for the year ending on the 30th September, 1955.

In the plaint plaintiff also asked for an order that an account be taken of the commission due to plaintiff as, apparently, he does not accept the accountants' certificate. In order to save further expense, however, I suggested at the hearing that plaintiff should himself be given the opportunity to examine the relevant account books. Counsel agreed and Mr. Rawson gave an undertaking that the relevant books would be produced in Ipoh — they are normally kept in Kuala Lumpur — and plaintiff given the opportunity of making a personal examination of them. No order by me is necessary, therefore, on this item of the claim.

In his plaint plaintiff asks for interest on the two sums awarded him by this judgment with effect from the 1st day of December, 1954. But this claim overlooks the fact that by the terms of the agreement defendants were entitled to pay plaintiff his salary each month and had they exercised their right to do so the last payment would not have been made until the 31st day of July, 1955. I therefore award plaintiff interest at the rate of 6% per annum on the sum of $2,600 with effect from the 1st August, 1955, until satisfaction. With regard to the commission I have awarded him defendants will pay interest at the rate of 6% per annum with effect from the date of the auditors' certificate relating to the company's financial year which ended on the 30th day of September, 1955, until satisfaction. Plaintiff will also have his costs.

Judgment for plaintiff.

Solicitors : *Das & Co.; Shearn, Delamore & Co.*